estoppel cannot be spelled out; and yet if a creditor knows of facts which give the stockholder a defense against the corporation, he cannot hold the subscriber.[15] As the capital stock is not a liability of the corporation,[16] a release of a subscriber would be a gift that creditors could have set aside. But this does not explain the cases where the release was given for a consideration, for there the stockholder, as in the principal case, can still be held by prior creditors. Perhaps the truest explanation is that "the courts have been doing legislative work" with a "more or less systematic judicial recognition of a demand of the commercial world."[17]

PRESCRIPTIVE RIGHT OF PUBLIC AND OF FREEHOLD INHABITANTS TO FISH IN PRIVATE WATERS. — Several interesting questions of prescription were settled in two recent cases in the House of Lords. *Johnston* v. *O'Neill*, [1911] A. C. 552; *Harris* v. *Earl of Chesterfield*, [1911] A. C. 623. In the first, four[1] of the seven lords held that a right to fish in private[2] waters cannot be acquired by the public by immemorial user. The decision of the majority is amply sustained by authority,[3] though this is the first time the question has come before the House of Lords. A right of fishing in another's waters is a profit *à prendre*, a right to take a part of the produce of the land, as distinguished from an easement, which is a right without profit.[4] A profit *à prendre* is incapable of creation except by grant or prescription.[5] In the principal case there is no dominant estate to which a right by prescription could be attached,[6] nor can a grant in gross be presumed, for the unorganized public is incapable of taking by grant.[7] Thus the right, if any, must rest solely upon

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have put into the treasury of the corporation, in some form, the amount represented by it." Handley *v.* Stutz, 139 U. S. 417, 430, 11 Sup. Ct. 530, 535.

[15] Coit *v.* Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231.

[16] Bridgman *v.* City of Keokuk, 73 Ia. 42, 33 N. W. 355.

[17] See 34 Am. L. REG. N. S. 448, 456.

[1] The Earl of Halsbury and Lords Macnaghten, Dunedin, and Robson. Lord Ashbourne, although not passing directly on the question, agreed with the majority, while Lord Shaw of Dunfermline intimated a contrary view. The Lord Chancellor dissented from the majority on the ground that the plaintiff had no title upon which to sue.

[2] An incidental question decided in the case is that a non-tidal lake of whatever size, even though actually navigable, does not belong as of right to the Crown. This follows the English rule as to rivers. See Lord Leconfield *v.* Lord Lonsdale, L. R. 5 C. P. 657, 665. But the rule as to large lakes had not previously been conclusively settled. See Johnston *v.* O'Neill, *supra*, 572. The rule here established is contrary to the general holding in the United States. Percy Summer Club *v.* Astle, 163 Fed. 1; Sloan *v.* Biemiller, 34 Oh. St. 492. But *cf.* Adams *v.* Pease, 2 Conn. 481. For a discussion of the opposite views, see 3 KENT COMM. 429, note *a*; 2 FARNHAM, WATERS AND WATER RIGHTS, § 368 *c*.

[3] Smith *v.* Andrews, [1891] 2 Ch. 678; Murphy *v.* Ryan, Ir. R. 2 C. L. 143; Albright *v.* Cortright, 64 N. J. L. 330, 45 Atl. 634.

[4] Lloyd *v.* Jones, 6 C. B. 81; Peers *v.* Lucy, 4 Mod. 362; Cobb *v.* Davenport, 33 N. J. L. 223.

[5] Grimstead *v.* Marlowe, 4 T. R. 717; Mellor *v.* Spateman, 1 Saund. 340 *c*, note 3.

[6] Grimstead *v.* Marlowe, *supra*; Ordeway *v.* Orme, 1 Bulstr. 183; Merwin *v.* Wheeler, 41 Conn. 14.

[7] Lloyd *v.* Jones, *supra*; Fowler *v.* Dale, Cro. Eliz. 362; Hill *v.* Lord, 48 Me. 83.

custom, and although custom will support an easement,[8] it has from early times been held incapable of supporting a profit *à prendre*.[9]

In the second case, a right of fishing was claimed by prescription on the basis of immemorial user by the freeholders in certain parishes along a navigable but non-tidal river. Here there were estates to which the right could be attached by prescription. But as the right claimed was a right to take fish without stint and for commercial purposes, four[10] of the seven lords held that it could not be so acquired, for it was not necessary to the enjoyment of the dominant estates, nor was it reasonable, for the estates could be divided indefinitely and thus exhaust the servient estate; so there were no reasonable grounds for presuming a grant. This decision seems correct, for although the very point had not previously arisen, it had in general been held that a profit *à prendre* claimed as appurtenant to an estate must be reasonably limited to the needs of the estate in which such right was claimed to inhere.[11]

Another interesting question in the last mentioned case, although raised in the pleadings, was not pressed in the argument, and so was not decided. This is whether the right of fishing, if claimed in gross, could have been sustained. The Lord Chancellor and Lord Ashbourne dissent from the holding of the majority on the ground that a right in gross should be found in the present case by prescription, while Lord Gorrell accords with the majority on the express ground that no right in gross is urged. The Lord Chancellor and Lord Ashbourne follow the case of *Goodman* v. *Mayor of Saltash*,[12] in which a grant to the free inhabitants of ancient tenements in a borough as a corporation, or a grant to a corporation for the use of the inhabitants, was presumed. The Saltash case can be supported, if at all, only on the ground of a charitable trust.[13] The decision, it is submitted, was at least questionable,[14] and in a later case[15] Kay, J., refused to apply it to circumstances such that it was not reasonable to suppose there had at one time been a corporation to which the grant could have been made. Lord Gorrell intimates that *Harris* v. *Earl of Chesterfield*

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[8] Race *v.* Ward, 4 E. & B. 702; Abbot *v.* Weekly, 1 Levinz 176. It should be noted in this connection that in the United States some jurisdictions hold that no rights whatever can be established by custom, on the ground that there can be no immemorial user in America. Harris *v.* Carson, 7 Leigh (Va.) 632; Young *v.* Collins, 2 Browne (Pa.) 292.

[9] Attorney-General *v.* Mathias, 4 Kay & J. 579; Gateward's Case, 6 Coke 59 b. *Contra*, Mayor of Linn-Regis *v.* Taylor, 3 Levinz 160. The reasons advanced are that such a right would be uncertain, unreasonable, as tending to destroy the subject matter to which the custom applied, and impolitic as establishing an unreleasable incumbrance upon land. Further, while an easement may originate by mere dedication to the public and acceptance by the public authorities, a profit *à prendre* cannot be acquired by such means. Fitchburg R. Co. *v.* Page, 131 Mass. 391; Cobb *v.* Davenport, 32 N. J. L. 369.

[10] The Earl of Halsbury and Lords Gorrell, Macnaghten, and Kinnear. Lord Loreburn, L. C., accords in *dictum*.

[11] Scholes *v.* Hargreaves, 5 T. R. 46; Heyward *v.* Cannington, 1 Sid. 354; Merwin *v.* Wheeler, *supra*. See 2 Bl. Comm. 265.

[12] 7 App. Cas. 633.

[13] Gray, The Rule against Perpetuities, §§ 581–583.

[14] Rivers *v.* Adams, 3 Ex. D. 361; Weekly *v.* Wildman, 1 Ld. Raym. 405; Hill *v.* Lord, *supra*. But *cf.* Willingale *v.* Maitland, L. R. 3 Eq. 103; Chilton *v.* Corporation of London, 7 Ch. D. 735.

[15] Tilbury *v.* Silva, 45 Ch. D. 98.

embodies such circumstances. The view of the minority extends the Saltash case to prescription by freeholders of certain parishes and is thus harder to reconcile with authority than the case followed.[16] It is to be regretted that the majority did not pass upon this question, and thus decide whether such unreleasable rights should be allowed to be further extended.[17]

ANCILLARY APPOINTMENT OF RECEIVERS IN FEDERAL COURTS. — A bill seeking the appointment of a chancery receiver must show a right to some distinct equitable relief.[1] Moreover the United States Supreme Court early decided that a receiver had no power outside of the jurisdiction in which he was appointed.[2] Under this doctrine, the receiver must obtain some appointment from the courts in the other jurisdictions where he wishes to sue.[3] A recent case decided that a receiver already appointed in one federal jurisdiction was not properly appointed "ancillary"[4] receiver in another federal jurisdiction after an *ex parte*[5] hearing of a bill which merely asked for confirmation of his appointment in the original jurisdiction and showed no right to distinct equitable relief. *Fairview Fluor Spar and Lead Co.* v. *Ulrich*,[6] 44 Chic. Leg. News 81 (C. C. A., Seventh Circ.).

The reason why a receiver has no extra-territorial power is because he has no title to the assets or property,[7] but is merely invested by the court of his appointment with the power of gathering them in, and this investiture of power need not be recognized in other jurisdictions.[8] On the other hand, as a practical matter, foreign receivers are allowed to sue in most of the state courts,[9] and some federal courts, though admitting the general rule laid down by the Supreme Court, allow foreign receivers to sue as a so-called matter of comity.[10] Comity in this connection

[16] Bland *v.* Lipscombe, 4 E. & B. 713 n. c; Whittier *v.* Stockman, 2 Bulstr. 86.

[17] See GRAY, THE RULE AGAINST PERPETUITIES, § 579.

[1] See 3 STREET, FEDERAL EQUITY PRACTICE, § 2541. So a bill that asks only for the appointment of a receiver will not be entertained. Greene *v.* Star Cash & Package Car Co., 99 Fed. 656.

[2] Booth *v.* Clark, 17 How. (U. S.) 322; Great Western Mining & Mfg. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770. See Hale *v.* Allinson, 188 U. S. 56, 68, 23 Sup. Ct. 244, 249.

[3] Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 69 Fed. 871. See HIGH, RECEIVERS, § 47; 3 STREET, FEDERAL EQUITY PRACTICE, § 2692.

[4] It is not technically an "ancillary" bill. Coltrane *v.* Templeton, 106 Fed. 370.

[5] A receiver may be appointed *ex parte* under certain special circumstances. See 3 STREET, FEDERAL EQUITY PRACTICE, § 2551.

[6] *Accord*, Mercantile Trust Co. *v.* Kanawha & Ohio Ry. Co., 39 Fed. 337; *In re* Brant, 96 Fed. 257. *Contra*, Platt *v.* Philadelphia & Reading R. Co., 54 Fed. 569. See Greene *v.* Star Cash & Package Car Co., *supra*.

[7] A receiver that has title either by statute or assignment may sue of right in a foreign jurisdiction. Hawkins *v.* Glenn, 131 U. S. 319, 9 Sup. Ct. 739; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888.

[8] See ALDERSON, RECEIVERS, § 28.

[9] Bank *v.* McLeod, 38 Oh. St. 174; Metzner *v.* Bauer, 98 Ind. 425; Runk *v.* St. John, 29 Barb. (N. Y.) 585. See HIGH, RECEIVERS, § 47.

[10] Rogers *v.* Riley, 80 Fed. 759; Kirtley *v.* Holmes, 107 Fed. 1; Lewis *v.* Clark, 129 Fed. 570. See Chandler *v.* Siddle, 3 Dill. (U. S.) 477, 479. *Contra*, Fowler *v.* Osgood, 141 Fed. 20; Hilliker *v.* Hale, 117 Fed. 220.